

**Objection to the Denial of Class A-SO
Provisional Certification for Hartford
Iron & Metal Inc. IWP No. INP0000612
And Karen Harkins, Provisional Operator Applicant
Cause No. 18-W-J-5021**

OFFICIAL SHORT CITATION NAME: When referring to 2019 OEA 57, cite this case as **Karen Harkins 2019 OEA 57.**

Case name: Objection to the Denial of Class A-SO Provisional Certification for Hartford Iron & Metal Inc., IWP No. INP0000612 and Karen Harkins, Provisional Operator Applicant

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Topics:

Motion to Strike
Indiana Rules of Evidence 408
Offer to Compromise
Dismissal
Ind. Trial Rule 12(B)(1)
Subject matter jurisdiction

Presiding Environmental Law Judge: Catherine Gibbs

Party representatives:

Counsel for IDEM:	Sierra Alberts
Petitioners:	Jamie Dameron (Farmer Scott Ozete Robinson & Schmitt) Mark Shere (Shere & Shere LLP)

Order issued: September 10, 2019

Index category: Water

Further case activity: none

STATE OF INDIANA)
)
COUNTY OF MARION)

BEFORE THE INDIANA OFFICE
OF ENVIRONMENTAL ADJUDICATION

IN THE MATTER OF:)
)
OBJECTION TO THE DENIAL OF CLASS A-SO)
PROVISIONAL CERTIFICATE FOR)
HARTFORD IRON & METAL, INC.)
IWP NO. INP0000612)
AND)
KAREN HARKINS)
PROVISIONAL OPERATOR APPLICANT)
HARTFORD, BLACKFORD COUNTY, INDIANA)

CAUSE NO. 18-W-J-5021

FINAL ORDER GRANTING MOTION TO DISMISS

Hartford Iron & Metal, Inc. and Karen Harkins (Petitioners), filed their Rule 12(B)(1) Motion to Dismiss on August 1, 2019. The Indiana Department of Environmental Management (IDEM) filed its Response to Petitioners' Rule 12(B)(1) Motion to Dismiss and Motion to Strike the Inadmissible Settlement Negotiation Communication on August 16, 2019. Petitioners did not file a reply. The presiding Environmental Law Judge, having read the motion, response and reply now enters the following final order.

Motion to Strike

IDEM moves to strike the attachment to Petitioners' Rule 12(B)(1) Motion to Dismiss. This attachment is an email from Sierra Alberts, counsel for IDEM, to Jamie Dameron, counsel for Petitioners. Indiana Rules of Evidence 408 states:

(a) Prohibited Uses. Evidence of the following is not admissible on behalf of any party either to prove or disprove the validity or amount of a disputed claim or to impeach by a prior inconsistent statement or a contradiction:

- (1) furnishing, promising, or offering, or accepting, promising to accept, or offering to accept a valuable consideration in order to compromise the claim; and
- (2) conduct or a statement made during compromise negotiations about the claim. Compromise negotiations include alternative dispute resolution.

It is clear that the email contains an offer to compromise and thus is not admissible. The motion to strike is **GRANTED**.

Findings of Fact

1. On August 7, 2018, IDEM notified Hartford Iron of its decision (the Letter) to deny Karen Harkins' application for a Class A-SO Provisional Certificate for Hartford Iron and Metal Wastewater Treatment Plant (WWTP or the "Facility").

2. The Letter stated that Hartford Iron’s Facility was classified as D rather than A-SO.
3. On August 24, 2018, the Petitioners timely filed their petition for review of the denial of Ms. Harkins’ license and the Facility’s classification. On March 11, 2019, Petitioners filed a motion to dismiss without prejudice pursuant to Indiana Trial Rule 41(A) (Motion to Dismiss I) and specifically asked that the dismissal be subject to their right to reinstate the Petition as of the date of its original filing. IDEM objected to a dismissal without prejudice stating that it had not stipulated to a dismissal without prejudice. IDEM pointed out that a dismissal without prejudice does not toll the statute of limitations in which to file a petition for review. *See Elmore v. Henderson*, 227 F3d 1009, 1011 (7th Cir. 2000).
4. The Motion to Dismiss I was provisionally granted. The presiding ELJ granted the motion but determined that Petitioners could not reinstate the Petition for Review because the limitations period for filing the petition had passed. Therefore, Petitioners were allowed the opportunity to withdraw their Trial Rule 41(A) Stipulation of Voluntary Dismissal Without Prejudice or, Alternatively, Motion to Dismiss Without Prejudice.
5. Petitioners filed Rule 12(B)(1) Motion to Dismiss (Motion to Dismiss II) on August 1, 2019, wherein they withdrew the Motion to Dismiss I and filed the Motion to Dismiss II asking that the OEA determine that the issue regarding the WWTP’s classification is not ripe for review.
6. IDEM filed its response on August 16, 2019 in which it states that “The only agency action on appeal in this cause is IDEM’s denial of a Class A-SO Provisional Certificate to Hartford Iron.”¹ IDEM further states, “IDEM agrees with the Petitioner’s argument that the issues before this Court are “no longer about a reviewable ‘agency action’ and the ‘reclassification’ is not ripe for review.”² And IDEM then goes on to state “The only issue before this Court is the denial of Hartford Iron’s provisional certificate for a Class A-SO WWTP operator.”³
7. Ms. Harkins has obtained her permanent wastewater certification.

Conclusions of Law

1. The OEA has jurisdiction over the decisions of the Commissioner of the Indiana Department of Environmental Management (“IDEM”) pursuant to Indiana Code (I.C.) § 4-21.5-7, et seq.

¹ The Indiana Department of Environmental Management (IDEM) filed its Response to Petitioners’ Rule 12(B)(1) Motion to Dismiss and Motion to Strike the Inadmissible Settlement Negotiation Communication, filed August 16, 2019, pg. 3.

² The Indiana Department of Environmental Management (IDEM) filed its Response to Petitioners’ Rule 12(B)(1) Motion to Dismiss and Motion to Strike the Inadmissible Settlement Negotiation Communication filed August 16, 2019, pg. 4.

³The Indiana Department of Environmental Management (IDEM) filed its Response to Petitioners’ Rule 12(B)(1) Motion to Dismiss and Motion to Strike the Inadmissible Settlement Negotiation Communication filed August 16, 2019, pg. 4.

2. Findings of Fact that may be construed as Conclusions of Law and Conclusions of Law that may be construed as Findings of Fact are so deemed.
3. Under 315 IAC 1-3-1(b)(18), the presiding Environmental Law Judge (the “ELJ”) may apply the Indiana Rules of Trial Procedure when it would not be inconsistent with the Administrative Orders and Procedures Act (“AOPA”) (Ind. Code §4-21.5-3 *et seq.*) or with the remaining rules in Title 315 of the Indiana Administrative Code.
4. Indiana Trial Rule 12(B)(1) provides that lack of subject matter jurisdiction over the subject matter is a defense to a cause.
5. There appears to be a material issue of fact as to whether the Facility’s true classification is D or A-SO; the Letter states that it is D, but Petitioner argues that the classification is A-SO. The question remains of whether the Letter was intended to be notice to Hartford Iron (per 327 IAC 22-5-6) that IDEM had reclassified the Facility.
6. Looking at IDEM’s response brief ONLY⁴, it is clear that IDEM and the Petitioners agree that the Letter DOES NOT serve as a reclassification of the Facility. As such, the Letter is not an agency action regarding this issue. As there is no agency action, OEA does not have subject matter jurisdiction of this issue until such time as IDEM takes action.
7. The only issue that was ripe for review in the Letter was whether IDEM properly denied Ms. Harkins her certification. The parties agree that Ms. Harkins has received her certification, therefore, the issue is moot. As there are no other issues before the OEA, the motion to dismiss should be granted.

Final Order

It is ORDERED, ADJUDGED AND DECREED that Petitioner’s Motion to Dismiss is **GRANTED**.

You are further notified that pursuant to provisions of Ind. Code (I.C.) § 4-21.5-7-5, the Office of Environmental Adjudication serves as the ultimate authority in administrative review of decisions of the Commissioner of the Indiana Department of Environmental Management. This is a Final Order subject to Judicial Review consistent with applicable provisions of I.C. § 4-21.5. Pursuant to I.C. § 4-21.5-5-5, a Petition for Judicial Review of this Final Order is timely only if it is filed with a civil court of competent jurisdiction within thirty (30) days after the date this notice is served.

IT IS SO ORDERED this 10th day of September, 2019 in Indianapolis, IN.

Hon. Catherine Gibbs
Environmental Law Judge

⁴ The email attachment has been struck from the record and was not considered in this conclusion.